Special Masters and Prison Reform: Real and Imagined Obstacles*

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I. INTRODUCTION

Prisoners and their keepers come by their relationship in a singular way and we might easily suppose that this relationship has never been free of conflict. The agility of societies in this regard has not been in resolving the conflict amicably, but merely in isolating it. Centuries ago, societies relegated the mad and the criminal to ships where they endured the world with their masters at the helm—ships of fools adrift off the coasts of their countries.[1] Little is known about life on these cruises, but it is easy to conjure, for example, that the isolation of being at sea and the attendant diffidence of the mainland society promoted the madness of the criminally insane and the impunity of the guards. While not necessarily unusual at those times, the sadistic atmosphere of these ships surely was cruel. That we never learned of conflict on these ships, or that its quelling was little publicized, does not free us to conclude that harmony was the essential mode of the community on these ships.

The methods of asylum and imprisonment changed over centuries, and eventually the criminal and the dangerous harbored back on land. The concepts of the prison, the penitentiary, and the gaol supplanted ships as the dominant method of isolating criminals.[2] Although one might argue forever the causes of this evolution, to call the process reform is optimistic and probably disingenuous. The criminal and the insane now resided nearby, or at least on the mainland of their countries, but their

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1. *See* M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 257-92 (1979). *See also* F. WISE, PUNISHMENT AND REFORMATION: AN HISTORICAL SKETCH OF THE RISE OF THE PENITENTIARY SYSTEM 170 (1895). *See generally* A. EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775 (1987).

2. *See* R. PUGH, IMPRISONMENT IN MEDIEVAL ENGLAND 57-89 (1968); C. LASCH, THE WORLD OF NATIONS: REFLECTIONS ON AMERICAN HISTORY, POLITICS, AND CULTURE 3-17 (1973). *See generally* E. HOBSBAWM, PRIMITIVE REBELS: STUDIES IN ARCHAIC FORMS OF SOCIAL MOVEMENT IN THE 19TH AND 20TH CENTURIES 1-30 (1959); Thompson, *The Crime of Anonymity*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 255-308 (1975).

countrymen remained insulated from the world of prisoners. It is not merely sentimental to observe that the imperial walls that circumscribe the archetypal prisons in this country serve as much to keep people out as to keep them in. And of course it is more common to see the inmates climbing over to get out than it is to observe a free man vaulting his way inside.

Inside prisons, a disparity in power relations inevitably prevailed and dispute resolution took on a particularly primitive cast when parties were of unequal strength. The society's psychological characterization of prisoners, and the derivative paranoia, permitted the ceding to the keepers of a breadth of unaccountability essentially incompatible with democratic rule, open societies, and accountable government.[3] A perhaps trivial but ultimately telling reflection of the separation between government and prisoners is the almost universal principle that, upon conviction, convicts lose their most basic civil right—the right to vote.[4] Although the rationale for this principle is worth exploring, since it appears to yield some internal contradictions, such exploration is beyond the scope of this Article. It is worth observing here, however, that the denial of prisoners' right to vote is a necessary political and psychological corollary of the vast deference that our society traditionally has granted to prison administrators. Only if the people over whom these administrators lord their powers and prerogatives are not citizens, or part of the polity, can this unhindered power be reconciled with any plausible theory of democracy.

Thus, prisoners enter the class of the politically powerless, and they do so in a manner that, in many respects, makes them more pariahs than virtually any other class. It was perhaps this uniform exclusion from the core political processes of the society that, in turn, gave rise to an ultimately unsupportable contradiction. Under the fundamental theories of government that suffuse the United States Constitution, the legislative and executive branches are intended to be responsive to the wishes of the electorate, as expressed through the essential processes of

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3. The United States Supreme Court stated in Pell v. Procunier, 417 U.S. 817 (1974), that "the press and the general public are accorded full opportunities to observe prison conditions." *Id.* at 830. *Pell* appeared to suggest that any blanket restriction on public access to information about public officials would violate the first amendment rights of both the press and the public. But in Houchins v. KQED, Inc., 438 U.S. 1 (1978), the Court held that the press had no special right of access beyond that accorded the general public, even if the public was denied access. The majority in *Houchins* held that "the media have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 11. *See generally* Shattuck & Byers, *An Equalitarian Interpretation of the First Amendment*, 16 HARV. C.R.-C.L. L. REV. 377, 391-95 (1981).

4. For a detailed analysis of statutory and constitutional disfranchisement provisions, *see* D. RUDENSTINE, THE RIGHTS OF EX-OFFENDERS 159-70 app. (1979).

government. Where, for one reason or another, those branches are not, or can not be, responsive to the legitimate concerns of a class, that class is afforded relief and protection by the judiciary.[5] The insupportable contradiction in our past is that while states were disenfranchising convicts, thereby shutting prisoners out of the political process, courts where articulating a hands-off policy that sheltered prisons from any public inquiry and relegated prisoners to the most abject isolation within a professedly democratic society.

This policy of deference and inattention may be a measure of how deeply entrenched the idea of prison as asylum is in the American ethos. This history is familiar, although its actual theoretical basis has not really been explored. In simple terms relevant to this Article, it is perhaps sufficient to observe that the conflicts inside prison walls were not thought to be cognizable in a court of law.[6] A hands-off policy ultimately reflects a judgment that the clashing disharmony of prisons should be resolved by other-than-judicial means. It is conceivable that the governing political ideal was to permit the conflicts to be resolved naturally, according to the established modes of power and control.

In any event, for interesting but presently irrelevant reasons, courts ultimately parted this veil of neglect.[7] This development has meaning

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5. The judiciary has long been viewed as the haven for the outcast, the victimized and the powerless. As Justice Black stated in Chambers v. Florida, 309 U.S. 227 (1940), "[u]nder our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." *Id.* at 241.

6. For cases upholding the "hands-off" policy, *see, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); *In re* Taylor, 187 F.2d 852 (9th Cir.), *cert. denied*, 341 U.S. 955 (1951); Stroud v. Swope, 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951); Garcia v. Steele, 193 F.2d 276 (8th Cir. 1951); Sturm v. McGrath, 177 F.2d 472 (10th Cir. 1949); Dayton v. Hunter, 176 F.2d 108 (10th Cir. 1949), *cert. denied*, 388 U.S. 888 (1950); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); Curtis v. Jacques, 130 F. Supp. 920 (W.D. Mich. 1954); United States *ex rel.* Collins v. Heinze, 219 F.2d 233 (9th Cir. 1955); Henson v. Welch, 199 F.2d 367 (4th. Cir. 1952); Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944); United States *ex rel.* Vraniak v. Randolph, 161 F. Supp. 553 (E.D. Ill. 1958); Peretz v. Humphrey, 86 F. Supp. 705 (M.D. Pa. 1949); Feyerchak v. Hiatt, 7 F.R.D. 726 (M.D. Pa. 1948). *See generally* FRITCH, CIVIL RIGHTS OF PRISONERS 31 (1961) (origin of the term "hands-off"); Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 509 (1963).

7. One of the earliest decisions to retreat from the "hands-off" doctrine was *Ex parte* Hull, 312 U.S. 546 (1941) (invalidation of prison regulation requiring the screening of petitions for habeas corpus by prison officials). The use of § 1983 of the Civil Rights Act of 1871, rather than the traditional use of habeas corpus, was first upheld in Monroe v. Pape, 365 U.S. 167 (1961). *See also* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) ("[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."). *See generally* Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 CUMB. L. REV. 31, 32-39 (1976).

in a wide variety of spheres, but, for the present purpose, let us say simply that these decisions heralded a self-conscious decision on the part of judges that the conflicts inside prison walls would be brought into the society's primary forum for public dispute resolution—the federal courts.

I will not discuss in this Article the role of litigation in resolving the conflicts that arise between prisoners and their keepers. Plainly, without this litigation, much of the conflict would have remained out of sight in American society. Experience tells us that this means only that the prevailing power relationships in prison will operate to settle disputes.[8] This of course does not mean that all prisoners are victimized or that all administrators or guards prevail. The internal power structures of a prison are considerably more complex than that, and in any event, inmates have their own fights with one another. In the absence of federal court intervention, it is almost axiomatic that struggles between prisoners are left to the prisoners to resolve among themselves.

II. THE SPECIAL MASTER: COPING WITH NONCOMPLIANCE

Litigation has not solved all of the conflicts that arise between prisoners and their keepers, not even when a court order mandating reform has been entered. The reasons for this deficiency are myriad. Court orders frequently are vague; often they are abstract; and they typically rely on formulae that have meaning in the parlance of law, but which founder ultimately when used to guide actual human conduct. It may finally be true that federal judges are ill-equipped to prescribe the daily regimens for an institution as febrile and complex as a prison. In any event, let us posit that court orders, on their own, have not solved the problems that occasioned, after so long, the entree of federal courts into this strange world of prison life.

After ten years of court orders being entered, contested, ignored, and sporadically enforced with uneven results, a new turn in the field was taken by the incorporation into the area of an old idea—the special master. For it turned out that in the process of entering federal court decrees requiring the achievement and maintenance of constitutional conditions in prisons, those involved in the process came to see they had embarked upon a particularly complex and unwieldy enterprise.[9] Lengthy detailed mandatory injunctions, requiring vigilant monitoring

8. *See generally* A. SAMPLE, RACEHOSS: BIG EMMA'S BOY 157 (1984).

9. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419 (1979).

and enforcement in an institution remote from the known norms of a society and accustomed to its almost gothic isolation, did not yield to the established processes of formal adjudication in federal courts. Over time, judges and litigators found that the resolution in the courtroom did not translate automatically, and often not at all, into actual substantive change upon which a final laurel of constitutionality might be rested. As this knowledge evolved, the law, in its internal organic genius, searched out from its own legacy a solution at once ancient and modern—the mechanism of the special master.

A. *The Obdurate Defendant and the Special Master: Dispelling Prevalent Caricatures*

The use of special masters in institutional reform litigation is by now a sufficiently acknowledged curiosity that it has its own literature, and within that literature we can detect the dialectics of orthodoxy, heretical critiques, revisionism, and synthesis (historical and ahistorical).[10] Because of this spate of attention, the general topic of the role of special masters in dispute resolution is both too tired and too broad for me to write about. I want instead to address an important sub-theme. Really, what I have in mind is the dismantling of a prevalent caricature.

One of the dominant themes in the literature of prison reform is the image of the intransigent prison administrator at war with the activist judge, the cadre of legal aid lawyers toiling at the public till, and the outsider savant. Ultimately, this portrait, which has much truth to it, reduces to a core image: the special master forging a way through otherwise intractable obstacles to compliance. I personally have heard this image voiced many times, in a million ways. In simple terms, the common question is how a special master deals with the myriad of obstacles which impede his work. This question rests on a background assumption of obdurate defendants. Yet when I reflect on personal experience, I find nothing to support that image.

In fact, I cannot speak about the classic perception of intransigent defendants and corrections professionals who have staked their future on obdurate defiance of a lawful court order. In this regard, it seems

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10. *Id.*; Berger, *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Dobray, *The Role of Masters in Court Ordered Institutional Reform*, 34 BAYLOR L. REV. 581 (1982); Brakel, *Special Masters in Institutional Litigation*, 1979 A.F.B. RES. J. 543; Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 116; Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062 (1979); Note, *Masters and Magistrates in the Federal Courts*, 88 HARV. L. REV. 779 (1975). *See generally* J. DIIULIO, GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT (1987).

to me that the classic image of intransigence—the image of the Governor standing in the schoolhouse door, inviting the application of federal force as an agent for change—no longer has application in the remedial phase of prison reform. I understand that in this regard my experience has been limited, and perhaps is idiosyncratic. I acknowledge the possibility that presently there are in the country administrators who would resist to the fullest extent of their abilities the imposition of court ordered reform.[11] I simply have not had personal experience with this kind of conduct. I am willing to assert that I believe my experience in this regard is representative, and that indeed the image of Neanderthal prison officials simply is one that has no currency. In large measure this significant and heartening progress is the result of the development of standards within the profession that provide a benchmark for professional personnel in their dealings with prisoners, fellow staff, and other public officials.[12] I do not mean to gainsay the role prison litigation has played in the reform of prisoners. Yet, I do not believe I am being Pollyannaish in concluding that present day prison litigation serves not so much to club persistently wicked administrators into conforming their conduct with the mandates of the Constitution, as it serves to provide a lever for all interested people to use in obtaining the funds, personnel, and resources required to maintain a Constitutional prison.[13]

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11. I acknowledge that resistance to court ordered reform is prevalent. This resistance is couched in both philosophical and pragmatic terms. For an example of what I term philosophical resistance, *see* Support for a Revised Federal Policy on Consent Decrees Affecting the States, Proposed W. Governors Resolution., July 7, 1987. An example of pragmatic resistance to federal reform is the Texas Department of Corrections' response to Judge Justice's order prohibiting the use of building tenders for custodial purposes. *See* Ruiz v. Estelle, 503 F. 2d 1265 (5th Cir. 1982).

12. *See generally* ABA Comm. on Correctional Facilities and Services and Council of State Gov'ts, COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS (2d ed. 1975) (comprehensive compilation of corrections standards). *See also* AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS (1966) (comprehensive survey of standards of correctional institutions conducted by the American Correctional Association); George, *The Case for Correctional Accreditation*, in PRISONER'S RIGHTS SOURCEBOOK (1985) (cataloging various collections of prisoners' rights standards); ABA Section of Criminal Justice, COMPARATIVE ANALYSIS OF STANDARDS AND GOALS OF THE NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS WITH STANDARDS FOR CRIM. JUST. OF THE ABA (1974) (comparative analysis of the NAC and ABA correctional standards).

13. Increasingly, federal appellate court decisions in the area of prison law are being resolved on eleventh amendment grounds relating to the power of federal courts to compel state legislatures to spend money. *See, e.g.*, Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983). Ultimately, the eleventh amendment may stand as the most serious impediment to the preeminence of the Constitution in the history of constitutional adjudication. A prisoner's rights mean little, if anything at all, if they cannot be enforced, where enforcement is dependent upon political expenditures. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), *aff'd on rehearing*, 465 U.S. 89 (1984); Lelsz v. Kavanagh, 824 F.2d 372 (5th Cir. 1987).

B. *The Underlying Rationale for the Special Mastership*

I do not agree that the classic image of confrontational resistance is a primary foundation supporting the legitimacy of special masterships in a prison context.[14] The underlying rationale for masterships exists independent of that image. This rationale is not confuted, even if we have moved into a time when the wardens and department directors have moved from the jailhouse door to the no less embattled arenas of state legislatures.

It is here that the emerging dilemmas of the criminal justice system lodge and threaten to lurk unsolved. The expansion of crimes defined in state law, the proliferation of task force prosecutions, the consequent burdening of criminal court dockets, resulting plea bargains and determinate sentencing combine uneasily in exerting a range of conflicting pressures on limited state resources. How these pressures will be relieved is not clear. That prisons will bear a disproportionate share of the responsibility, with insufficient resources, can reasonably be predicted.

Having never encountered directly obdurate defendants intent on defeating the application of court orders to their institutions, I am reluctant to speculate on how a special master might properly deal with such a situation. However, I suppose that if faced with that problem, a special master would rely on a number of the items that have been identified in the literature: the authority to pursue specific personnel actions against deliberately noncompliant state employees[15] and, ultimately, the threat of harsh, direct court action in the form of criminal or civil findings of contempt.[16] In such a situation, a master of unwavering

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14. Prolonged noncompliance should not be viewed as a necessary but insufficient predicate for the appointment of a special master. A number of compelling reasons exist for appointing a special master prior to reaching a period of prolonged noncompliance. *See generally* Nathan, *The Use of Masters in Institution Reform Litigation*, 10 U. TOL. L. REV. 419 (arguing that rule 53 of the Federal Rules of Civil Procedure with its requirement of "exceptional condition" is not the sole authority for the appointment of a master). *But see* Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982) (holding that federal courts should defer to the policy choices made by prison officials); Bell v. Wolfish, 441 U.S. 520 (1979) (stating that simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations).

15. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Jones v. Wittenberg, 73 F.R.D. 82 (N.D. Ohio 1976); Guthrie v. Evans, 93 F.R.D. 390 (S.D. Ga. 1981).

16. The scope of the special master's authority regarding concept sanctions and injunctions is indeterminate. Courts delegating authority to special masters to recommend contempt sanctions include NLRB v. Local 282, 428 F.2d 994 (2d Cir. 1970); Helen Curtis Indus. v. Sales Affiliates, 247 F.2d 940 (2d Cir. 1957); NLRB v. Standard Trouser Co., 162 F.2d 1012 (4th Cir. 1947). Cases giving the special master narrower authority limited to fact finding relating to noncompliance and contempt include Heywood-Wakefield Co. v. Frank & Son, Inc., 98 F.2d 772 (2d Cir. 1938); United States v. International Longshoremen's & Warehousemen's Union, 334 F. Supp. 329 (N.D. Cal. 1971); Staley Elevator Co. v. Otis Elevator Co., 35 F. Supp. 778 (N.J. 1940).

character, impeccable credentials, strict determination, and flexibility would be desirable.

I do not mean to give short shrift to the idea of a special master battering defendants into compliance. I sincerely believe, however, that the days when this image has any application are over. If they are not, and I have misjudged the recent history of corrections, then I am confident nonetheless that I have judged correctly the fact that I have nothing meaningful to contribute on this issue, and I leave further discussion of it to special masters in whose work active resistance has been a real and current danger.

All of this is not to say that in my experience I have encountered only correctional administrators and line staff who, when presented with court ordered mandates with respect to conditions of confinement, have proceeded with the implementation of those reforms promptly and successfully. Obviously, were such the case, there would have been no call for the services of a special master. For although I do not see deliberate noncompliance to be a necessary predicate for the appointment of a special master, I do not doubt that problems associated with compliance are such a predicate.[17] It is simply a matter of the genesis of those difficulties, and how it relates to the state of mind of persons charged with implementing the court order, as well as the conception of the case brought to litigants by the special master that necessitate the services of a special master.

III. OBTRUSIVE VS. UNOBTRUSIVE SPECIAL MASTERS

A. *The "Wily Warden" and the "Dumbfounded Director"*

In this regard, a useful model constructed by Alan Dershowitz for pedagogical purposes with respect to the development of the law of

17. Federal courts traditionally have used masters in a wide variety of factual settings where the judgment was singularly difficult to enforce in traditional legal matters. *See, e.g.*, Los Angeles Brush Corp. v. James, 272 U.S. 701 (1927) (patent infringement); Smith v. Brown, 3 F.2d 926 (5th Cir. 1925) (suit to cancel a property deed); Magnaleasing, Inc. v. Staten Island Mall, 428 F. Supp. 1039 (S.D.N.Y. 1977), *aff'd per curiam*, 563 F.2d 567 (2d Cir. 1977) (leasing dispute); Investment Fund Corp. v. Bomar, 303 F.2d 592 (5th Cir. 1962) (bankruptcy proceeding); United States v. 3,065.94 Acres of Land, 187 F. Supp. 728 (S.D. Cal. 1960) (eminent domain). For a discussion of the traditional use of special masters, *see* Kaufman, *Masters in Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958); Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975). In La Buy v. Howes Leather Co., 352 U.S. 249 (1959), the Court upheld the appointment by a federal judge of a special master to make factual findings on the ground that the inherent intricacy of fact finding in federal antitrust actions warranted such an appointment. *See also* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973); Washington v. General Motors Corp., 406 U.S. 109 (1972); *Ex parte* Peterson, 253 U.S. 300 (1920); McCullough v. Cosgrave, 309 U.S. 634 (1940).

search and seizure under the fourth amendment and the application of the exclusionary rule is applicable.[18] Mr. Dershowitz asserted at the outset of the discussion that one's view of the fourth amendment, and concept of the appropriate scope of the exclusionary rule, depends on one's vision of the character of law enforcement officials. Succinctly stated, Mr. Dershowitz argued that the prevailing conceptions as reflected in fourth amendment law are that of the calculating cop on the one hand, and the bumbling constable on the other. The point is that an individual's view of the scope of the fourth amendment, and the propriety of the application of the remedy of the exclusionary rule depends on whether the individual thinks police misconduct is generated by cunning or ineptitude. I suggest this dichotomy, as well as its implications, are relevant to the consideration of the role of the special master in dealing with problems associated with the implementation of court decrees in prisons. Plainly, a mediator's conception of his role as it relates to his dealings with correctional administrators, line officers, inmates, and counsel is critical.[19] I therefore wish to propose a model similar to that used by Mr. Dershowitz. I suggest that one's concept of the role of the special master, and the development of techniques to deal with problems of compliance, depend on whether one carries to the prison the image of, on one hand, the wily warden and, on the other hand, the dumbfounded and deprived director.[20]

When a special master enters a case, he is bound to confront problems with compliance: areas of prison life where it is evident to the trained eye that the mandates of the court's order have not been implemented and where many a mile must be trod before compliance is achieved. I suggest it is critical at that point for the special master to clarify whether noncompliance is the result of intentional perfidy (the wily warden) or whether it is the result of a lack of skill, resources, training and energy. In this regard, I plainly prefer, and I suggest to you as an appropriate response, the image of the dumbfounded director—the corrections professional who lacks, for perhaps a wide variety of reasons, the wherewithal to achieve compliance without financial assistance.[21] If that image is

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18. Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1221 (1971).

19. R. FISHER & W. URY, GETTING TO YES 19-27 (1981).

20. A judge's view of prison officials correlates to some extent with whether the court will defer to them. Some Fifth Circuit opinions view administrators as incompetent and therefore uphold expansive orders. Other Fifth Circuit opinions indicate greater faith in prison officials and consequently frown on expansive orders. *Compare, e.g.*, Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (implementation of broad remedial measures in state prison is within the jurisdiction of the district court) *with* Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (court's task is limited to protecting inmates' constitutional rights and does not embrace superintending prison administration).

21. The National Institute of Corrections (NIC) of the United States Department of Justice reports a clear growth trend in corrections expenditures. The results of an NIC

accepted, and I want to say I very much believe it is the norm at present, I believe it generates certain imperatives with respect to the role of the special master in overcoming obstacles to compliance.

First let me say that this image argues for the primacy of staffing and training in the range of concerns to be addressed by a special master. Specifically, the special master must attend in great detail to the issue of staffing, in terms of adequate numbers of officers and appropriate post orders delegating specific tasks to those officers. Second, the special master must vigilantly evaluate the quality of the training program, and ensure that the most advanced professional training standards are adhered to at the institutional and departmental levels. Training in this context should be afforded the broadest possible definition, and should include inculcation in a broad variety of personal skills. Moreover, staff must achieve thorough familiarity with the specific requirements of the court's order as well as the broader legal regime applicable to prisons and jails.

With good, professionally trained, and conscientiously supervised staff, a prison can be run in a humane, safe manner. At that point I believe adherence to all specific provisions of a court decree is a task easily achieved. In contrast, a poorly selected, inadequately trained, and unsupervised staff will breed discontent and dissension in an inmate population which, in all superficial aspects, is provided with idyllic conditions. Asserting this view does not imply the futility of the movement within corrections toward professional standards. Nor does it contest the establishment of objective procedures as the best available guaranty against abuse inside institutions. Obviously, the assumption that a professionally trained staff will be able to adhere to a court decree is right, for it speaks the truism that established, mandatory procedures form the best protection for the powerless against the whims of dictators and zealots. At the same time, prisons and jails are intensely personal places. The quality of the relationship between an inmate and a staff member, whether it be on an issue of constitutional dimension such as discipline,

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survey show that during a twelve-year period from 1970 to 1982 the proportion of state operational expenditures budgeted for corrections increased in each of the fifty states. Costs of state correctional services increased from $931.4 million in 1970 to $6.1 billion in 1982. Total state expenditures tripled over the twelve-year period; expenditures for corrections increased by six times. Two factors contributed to the increased spending for corrections at the state level. The first is the unprecedented growth of the correctional workload, including a greatly increased rate of incarceration of offenders and a growth in probation and parole caseloads. The second factor in the growth in state spending for corrections is inflation, which has significantly driven up costs since 1970. The NIC survey concluded that "[w]ith the continuing expansion of correctional facilities due to growing inmate populations, it is likely that correctional services will continue in the future to absorb increasing proportions of state revenues. NATIONAL INST. OF CORRECTIONS, U.S. DEPARTMENT OF JUST., STATE EXPENDITURES FOR CORRECTIONS, 1970-1982/83 (Dec. 1983).

or an administrative matter concerning the loss of an inmate's family picture, says a great deal about the quality of our prisons and jails, and the quality of our society.[22]

These images, of staff inmate dealings suggest a central problem in the special master's work, and in the effort of establishing constitutional conditions. The issue of deprivation of inmate access to legal materials is of constitutional dimension, and properly so. In contrast, if an inmate loses his family pictures through a careless staff search or because his private possessions are not truly private, the loss probably does not reach a constitutional level. Yet one must question which deprivation works a more painful or enduring hardship on an inmate.

B. *The Unobtrusive Special Mastership*

Second, the image of the dumbfounded director generates another imperative fundamentally important to the conception of a master in how he deals with prisoners' problems: be as unobtrusive as possible. Plainly, a special master must have full and unfettered access to the institution, including all personnel and records. Such access has little to do with the intrusive character of the mastership. Michael Millemann proposes that we should be open in our advocacy of strong, intrusive masterships;[23] I strongly disagree. Intrusiveness is measured in the degree to which the special master arrogates to himself the task of making fundamental decisions in the administration of the jail, on critical security issues, or less important, administrative matters.[24] In this sense, a mastership that is intrusive is one designed to fail. We must be mindful always that a special mastership is something quite different from a receivership, and when we begin to talk about special masters implementing the order, or directing compliance, or ensuring conformity with the order, I believe we have entered the realm of receiverships. A receivership is the result, in many cases, of a mastership that has failed. In other words, a case that has on its record such a breadth of deliberate noncompliance and failed resolutions almost necessarily in these days is one in which the master's efforts have been unsuccessful. A mastership properly structured and effectively carried out will avoid the need for intrusiveness, and will end the case long before there is justification for the appointment of a receiver.

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22. For a classic description of the nexus between the quality of prisons and the quality of society, *see generally* A. KOESTLER, DARKNESS AT NOON (1941).

23. *See* Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

24. Some orders are so expansive that they in effect establish a receivership. For an example of an extreme special mastership, *see* Bronson v. Winters, No. 78807 (Super. Ct., Santa Clara, Cal. June 8, 1983). An example of an intermediate order is found in Jones v. Wittenberg, 73 F.R.D. 82 (N.D. Ohio 1976). A non-intrusive order can be found in Morales v. Turman, 569 F. Supp. 332 (E.D. Tex. 1983).

Of course, a special master in the course of his dealings with prison administrators will encounter strong resistance to certain changes, and at a minimum will encounter situations in which direct and immediate implementation of court ordered reforms simply will not be possible. These problems will often be generated by the specific individual whose presence in the correctional hierarchy serves in one way or another to obscure or divert the movement toward compliance. In this regard, the special master should attempt to the utmost extent possible to preserve the prevailing correctional administration, and to work with the administration in the implementation of reform. Only at the point the special master becomes convinced that under no circumstances can compliance with the order be achieved with present personnel should the special master change his course in this regard. The appropriate response at that time is to go directly to the appointing authority—the governor or the sheriff—and to convey to that person directly the master's impressions about the quality of leadership in the department. Hopefully the appointing authority will meet the representations of the special master with appropriate personnel action. If that does not happen, and the special master therefore concludes that the present correctional administration cannot, and will not, achieve compliance, I suggest that perhaps the grounds for an intrusive mastership—a receivership—have been laid.

Short of that eventuality, however, nonintrusiveness is the hallmark of a successful master. In the end, the administrators of the prison or jail will run the institution. When the master is gone, at the end of the day, at the end of a week-long visit, or at the end of the mastership itself, the people the master leaves behind in positions of authority will run the institution. That is how it should be. If I am right in asserting that ill-intentioned administrators are passe, then I suggest special masterships have every chance of being successful if they preserve, as inviolate as possible, the discretion of correctional administrators to make fundamental decisions about the institution. In most respects the special master's task is neither to run the prison, nor to arrogate the prerogatives of power. Rather the special master should work at retrofitting an administration, with an abundance of resources, supplied by virtue of the court order, which, if properly parlayed, can be used to run a constitutional and sane prison. A court ordered reform may provide the correctional administrator with a new physical plant, or at a minimum, a greatly renovated and improved facility. The administrator may have a new and abundant staffing complement that will permit the assignment of correctional officers to posts not previously present in the staffing plan, but required for safe and lawful operation of a facility. A new training regime to provide skills in a variety of critical areas may be in place. A court ordered reform may precipitate the development of new policies and procedures affecting fundamental core operations of the facility.

In such a context, a warden or jail director may be baffled, embarrassed, and paralyzed in the face of plenty. Moreover, the warden may be accustomed to a period of crisis management when he attempted to run the prison with an inadequate staff. While this crisis may have been handled with great dexterity and skill, it is probably part of a mental attitude that the changes I have mentioned rendered outmoded and perhaps counter-productive. We must acknowledge that there are aspects of crisis management that appeal to certain human instincts. As long as one perceives himself to be at the center of a critical and ongoing drama, it is not likely that role will be happily relinquished, unless self-enhancing aspects of the role can be replicated in another role.

In this regard, the special master should not overlook the degree of fear generated by unfamiliarity. Although crisis management may have about it an aura of danger, it may be more comfortable than a new administrative activity. And to the extent that unfamiliarity changes the warden's perception of his role, it may generate fear, some of it articulable, some of it not. What is most telling about this prospective rearrangement is that the warden or jail director may have a large number of new and different tasks to carry out as part of the daily conduct of his role. The special master should work closely with the warden in this regard, not making the decisions, but helping with the adjustment by going through new movements with the warden, answering questions, and assisting in the acquisition of new skills.

To be successful in this endeavor, the special master must have the trust and confidence of the administrator with which he deals. Much of the success of the special master depends on the quality of the relationship he has developed with the warden. If that relationship is sound, and if it has the appropriate elements of trust, confidence, and respect, the task of what I have called retrofitting will be accomplished, and it will improve the quality of the jail administration beyond measure. I am speaking here of developing a sense of the heightened pleasures of professionalism in the warden or jail director.

IV. The Internal Compliance Coordinator

Having abjured the image of the wily warden, and having developed thoughts on the imperatives generated by the image of the dumbfounded director, let me speak about what I believe to be a critical element in the special master's and the warden's efforts to achieve compliance. My experience has led me to conclude that an absolutely essential ingredient in the compliance movement is the appointment by corrections departments or sheriffs departments of an internal compliance coordinator,

devoted solely to the task of achieving and maintaining compliance with the court's order. Frequently, in the early phases of the mastership, department directors will avow to the special master that the governing intent of his administration will be to achieve compliance with the order. These assurances are heartening to be sure, but they should not be taken at face value, for they will, without more, lead to certain failure. This problem is not caused by any deficiency in the good faith expressed, or that such expressions are disingenuous. Rather, it simply is beyond the ability of most correctional administrators to run their department, and at the same time oversee, direct, and maintain compliance with the court order. That is just too much for one person to do.

A correctional administrator is responsible for the day-to-day operation of his department. This means, in turn, that he will be confronted with escapes, legislative dealings, budget crunches, correctional officer strikes, and a variety of other administrative nightmares that arise with startling but predictable frequency. Moreover, the orthodox response to these administrative crises may, in fundamental but not fatal ways, run afoul of the internal effort toward compliance instigated as a result of the court order. Although ultimately the mandates of correctional administration and the directives of the order may have to be compromised, neither the internal compliance coordinator nor the correctional administrator should have the absolute power to determine the moment of compromise or its form. Either person is poorly positioned to achieve a compromise grounded in reason and analysis.

I am suggesting here simply that an internal compliance coordinator should be appointed and his or her charge should be exclusively to familiarize all people in the department with the terms of the order, to promote all possible measures to achieve compliance, and when that state of grace is achieved, to construct internal guards against backsliding or retrenchment. That of course is a huge task, and it is not one for everyone, not even everyone devoted to lawful prisons.

Certain characteristics desirable in the internal compliance monitor can be identified. An internal compliance coordinator should be thoroughly knowledgeable in the daily operation of correctional institutions, as well as certain more general concerns of security, surveillance, and inmate management that must shape the correctional administrator's decision. The compliance monitor should have tremendous skills in motivating and educating other people, and place a great premium on a sense of humor; she should be tough and an indefatigable worker. People who combine these skills at their highest level are rare yet a sincere and devoted effort to identify and obtain the services of a person with all of these skills in some significant degree will be repaid, many times in the achievement of compliant conditions in a prompt, effective, and orderly manner.

V. OBSTACLES FACED BY THE SPECIAL MASTER

These thoughts on the nature of the special master's relationship with correctional administrators depart significantly from the prevailing characterization, or perhaps caricature, of correctional administrators that informs much thought about prison reform. Nonetheless, this relates to a prevalent obstacle to compliance, because by definition special masters inherit flawed institutions and are expected to correct them. This task will be simplified, I believe, if a special master rejects the stereotypes of resistance and focuses instead on the kinds of problems that are likely to exist in prisons in the 1980s.

Of course, ill-funded and overworked administrators, unfamiliar with the legal precepts of the court's order are not the only obstacles a special master will encounter.

Correctional reform is a difficult task, and because of that fact one should not be surprised to find difficulties in every quarter. That fact does not warrant pessimism, although the complexity of some of these issues may occasion despondency. These unarticulated obstacles to compliance that special masters predictably encounter, perhaps with increasing frequency, arise in the strangest quarters. They constitute, perhaps, an embroidery of the basic problem of institutional reform.

First, counsel who are unfamiliar with the particular difficulties associated with class representation in a correctional context can, without intending to do so, divert the compliance effort in a number of ways. The problem in this regard will have increasing currency in cases in which the defendant corrections department is represented by privately retained counsel unfamiliar with prison litigation and skilled in the standard techniques of "complex" civil litigation. A principle of these techniques is the use of delay as an active and pervasive defense strategy, apart from the protracted time periods inherent in institutional reform. The Federal Rules of Civil Procedure, combined with grotesquely overcrowded federal civil dockets, provide litigants with an abundance of opportunities to delay and frustrate reform simply through the crafty use of procedural devices. The special master can be of incomparable help to the court and to the parties in diffusing these delay techniques. The special master can bring to the case a sense of immediacy, and can be effective in cutting through delay tactics that skilled litigants pose. It is worth noting in this regard that one of the primary justifications for the use of special masters in the pre-trial discovery phase is to hasten the discovery process, and to shield against the built-in delays of the discovery process.[25] The special master has a particular obligation

25. *See, e.g.*, Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); Brazil, Kahn, Newman & Gold,

to counsel and the parties to remain in close contact with all persons so that they are aware of what is happening, when it is happening, and how it will affect everyone. Such prompt and regular contacts can be a successful device in expediting the litigation and in overcoming the imposition of delay as a defensive tactic.

A. *Prison Subclasses*

Similarly, plaintiffs' counsel unfamiliar with the peculiar nature of the class representation in a prison or jail context provides special masters, and litigants, with a variety of problems. Anyone familiar with the operation of the prison is aware that the inmate population consists, in fact, of numerous subpopulations. At the most routine level, prisons divide themselves among various groups to whom they owe overarching loyalty as a matter of basic lifestyle.[26] At a more dramatic and important level, groups and gangs form within prisons, and the divisions among these groups have real meaning with respect to the manner in which the prison must operate to ensure the safety of all prisoners, as well as staff members.[27] Finally, the conduct of prisoners within the prison environment provides classification data to administrators which enables them to form the bases for classification decisions that separate inmates from each other, either in general population living units or in various levels of administrative segregation.[28]

These divisions are merely a fact of prison life, but they have significant import with respect to the way in which plaintiffs' counsel represents the inmate class in a federal civil action relating to conditions of confinement and inmate activities at an institution, or, more importantly, across an entire state system. Although in fact the inmate population consists of subclasses, the procedural device of subclass representation is rarely used in prison litigation to ensure that all members of the inmate population have adequate representation.[29] Instead, the

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Early Neutral Evaluation, 69 JUDICATURE 279 (1986); Peckman, *A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985). *See generally* W. BRAZIL, G. HAZARD & P. RICE, MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS (1983) (collection of articles on the use of special masters in pretrial and discovery, with an emphasis on the use of special masters in the American Telephone & Telegraph antitrust case).

26. B. BAGDIHIAN, CAGED: EIGHT PRISONERS AND THEIR KEEPERS at xvii (1976).

27. Krajick, *The Menace of the Supergangs*, CORRECTIONS MAG., June 1980, at 11.

28. *See* Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982). *See also* AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 351-65 (1966).

29. *See, e.g.*, Steward v. Winter, 669 F.2d 328 (5th Cir. 1982); Alexander v. Gino's, Inc., 621 F.2d 71 (3d Cir. 1980); Dohner v. McCarthy, 635 F. Supp. 408 (C.D. Cal. 1985); Degidio v. Perpich, 612 F. Supp. 1383 (Minn. 1985); Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982); Glover v. Johnson, 85 F.R.D. 1 (E.D. Mich. 1977); Driver v. Helms, 74 F.R.D. 382 (R.I. 1977); Santiago v. City of Philadelphia, 77 F.R.D. 619 (1976); Monroe v. Bombard, 422 F. Supp. 211 (S.D.N.Y. 1976).

duty of conscientious representation devolves upon, most frequently, a single entity, styled "plaintiffs' counsel." Counsel must, during litigation and negotiations, identify solutions to real problems that, when viewed at a general level, provide the most favorable form of relief for the client group and its subgroups. It is impossible to overestimate the difficulty of this task.

Yet it is possible for plaintiffs' counsel to bear in mind her obligation to represent an entire prisoner population, and to avoid being captured by particularly vocal or visible subgroups of that class. In this regard, it is worth keeping in mind John Conrad's definition of objectives for a prison: that it be safe, lawful, industrious, and hopeful.[30] If plaintiffs' counsel can keep in mind that four-part mandate, and evaluate class representation against that backdrop, plaintiffs' counsel will have identified a workable benchmark for decision making on critical issues.

By way of example, imagine a mediation session between inmates and prison administrators which involved security measures to be taken in an administrative segregation housing unit. One might easily imagine plaintiffs' counsel arguing strenuously and articulately for the imposition of stringent measures regulating inmate movement, the assignment of security personnel to the administrative segregation housing unit, training of staff in security-related activities, and stringent penalties against inmates who violate disciplinary codes. On the other hand, one can imagine defendants' counsel arguing against each of these measures. Representation of a class in this manner is an example of conscientious class representation. The preservation of internal security to ensure the safety of the inmate class as a whole, as well as ancillary groups such as prison administrators and line officers, is an interest to be placed high on the array of sometimes conflicting and difficult to resolve interests implicated in the negotiation session I have described.

Issues of this kind are raised in virtually every general conditions case across the country. It is not clear that they are handled with the care that we might hope for. In litigation involving San Quentin, the notorious California prison, there was a significant upheaval when a court-appointed special master ordered the release of inmates from administrative segregation following hearings at which he substituted his judgments for those of the prison administrators. These releases were accompanied by his apparently blithe acknowledgement that the release of these inmates would lead to their deaths, or the deaths of others. Plainly, the special master's actions were insupportable. One must question as well the tactics of plaintiffs' counsel who was pressing the issue.

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30. J. CONRAD, CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRACTICES 42 (1965).

This advocacy represents a striking and disheartening example of myopic class representation and in fact discredits the prisoners' rights movement, and threatens to provide an enormous amount of potent ammunition to be used against that movement.[31] In the context of class representation, are the lawyers representing the inmate class in that case truly providing "adequate representation" to the inmates? Even if the class in that case is limited to inmates housed in administrative segregation, full-tilt advocacy of a particular individual's release, in the face of convincing documentation that release of that inmate will lead to his, or other inmates' harm, has little to do with appropriate adversarial work. The definition of class representation in this case indicates a crabbed, dangerous, and ultimately unethical discharge of an attorney's responsibility.

No one, absolutely no one, has an interest in the release of a particular inmate, if, as the special master in that case has been quoted as saying, it is clear that the inmate's release will result in his, or another inmate's, certain death.[32] We all must deplore such actions. Special masters have an independent obligation, as officers of the court, to ensure that court orders be applied conscientiously and sanely, with John Conrad's mandate in mind.

The existence of subclasses of a prisoner population necessarily entails a situation in which not all inmates will have a shared and undivided interest in the achievement of all specific measures mandated by a court order. If in the course of the litigation, there is only one class represented before the court, this fact of division may create serious problems in inmate relations, both for the prison administration and for the special master. Especially in cases when some form of compromise is used to resolve serious disputes without litigation, the impression is bound to be prevalent that something dear has been lost; that plaintiffs' counsel, the special master, and the judge are guilty of dereliction of duty.

In a related vein, it should be acknowledged that the plaintiff class itself, consisting of prisoners, can present formidable obstacles in the movement toward compliance with a court order, and in the efforts of a special master to monitor the state of compliance.

This fact presents a range of possibilities that the parties responsible for the implementation and oversight of compliance measures must acknowledge. First, Rule 23 of the Federal Rules of Civil Procedure[33] assigns to the judge the task of monitoring, independently of the rep-

31. Toussaint v. McCarthy, 597 F. Supp. 1388, 1421-22 (N.D. Cal. 1984).

32. This statement was attributed to the Special Master in *Toussaint* by Defense counsel in that case, who participated in the Woods Hole Conference on Special Masters, Woods Hole, Mass., May 1985.

33. FED. R. CIV. P. 23.

resentation of class advocates, the adequacy of any proposed compromise settlement of class-related issues. Plaintiffs' counsel may have an obligation to maintain an ongoing relationship with her clients, either a representative group, or selected inmates, or prisoners encountered randomly in the course of prison tours. Lawyers with skill understand this duty and that the maintenance of good relations between counsel and the plaintiff class almost certainly will become critical at some advance stage of the litigation. This reservoir of trust is particularly important when plaintiffs' counsel has to make difficult settlement decisions about security-related issues, or is called upon by the exigencies of litigation to make difficult decisions in trading off between relatively more or less important aspects of prison life. Plaintiffs' counsel *must* make her decisions at that time in a conscientious and professional manner. This imperative is likely to be lost, however, on inmates who may not be, and perhaps should not be, particularly clear-sighted about such issues, layered as they are with nuance.

Obviously, to the degree plaintiffs' counsel successfully discharges the decision-making duty, and the judge provides a rule 23[34] procedure on settlements that is open and fair, the special master's job will be easier. Ultimately, however, the special master has his own bridges to build and cross in his relationships with prisoners, and the path he constructs will not always assist him in achieving compliance. Indeed, as litigation becomes more successful, and the institution is brought within the ultimate goal of compliance, the stridency and frequency of inmate complaints tends to increase. This, of course, is understandable. Inmates who see in the near future an end to litigation, and loss of their immediate contacts with the court through the auspices of the special master, have legitimate concerns about the dissolution of the case. At the same time, certain vocal and powerful inmates may have mixed a variety of hidden agendas in with their legitimate concerns, and the special master will not view all of the concerns as valid.

B. *The Relationship Between the Special Master and Prisoners*

This peculiar and delicate relationship, between the special master and the prisoners is worthy of careful attention. The special master's long association with the case, and his perspective on progress made at the institution are fundamental parts of his role in the latter phase of the case. From the special master's perspective, inmate complaints about abhorrent conditions, and deviant, although hidden, practices, can create frustration and irritation. The special master's ardent and legitimate attempts to maintain a long and large view of the history of the institution

34. *Id.*

can also entail troubling, untold inattention to the intimate particulars of prison life. Certain aspects of prison life are bound to be unpleasant, perhaps painful, psychologically threatening, and always dispiriting. The litigation, of course, will never change these facts, and to a large extent they are beyond the purview of federal jurisdiction. At the same time, the large majority of inmates who express concerns of this nature, and who in fact will express them more as the case winds towards its close, deeply feel the indignity they express. These inmates probably believe sincerely that the federal court and the special master would end or at least diminish the pain. It is arrogant and insupportable for a special master to ignore these facts, and he does so at his peril.

This may seem an urging that the special master engage in a kind of precision tight-rope walk, and I must confess there are times, especially in institutions which in large part are in compliance, that such circus magic would be of great value. In his dealings with prisoners, especially as conditions at the institution improve, the special master must be kind yet critical, and question authority, yet acknowledge its legitimacy. He must yield gracefully to the termination of his role, with the mixed feelings of success in the accomplishment of his task, and sadness in the knowledge that he leaves behind, for all of the reforms he has witnessed, an institution that in fundamental ways offends one's sensibility.

A final point with respect to prisoner relationships. There is an enormous difference between working as a special master in a prison and a jail. Prisoner committees, especially those that achieve a degree of stability, are invaluable sources of information, trust, and communication. Of course, creation of such committees generates complications. These complications are beyond the scope of this Article. I mention them here, however, merely to point out that the fact of their existence creates a certain mode of operation for the special master.

Jails, in contrast, typically have populations that are far too transient for the formation of such a committee. In the absence of such enduring relationships with prisoners, and the chance to build up a degree of trust over time, the special master's efforts to unveil constitutional operations are enormously more complex. The importance of open and balanced relationships with staff consequently is greatly heightened, as is the demand placed on the special master's intuition or what have you, about truths dimly lit and obscurely perceived.

C. *The Relationship Between the Special Master and the Judge*

Finally regarding obstacles to compliance, the special master must pay close attention to his relationship with the judge, the judge's relationship to the order, and the judge's familiarity with the facts and conditions that make the role of the federal court in cases such as these legitimate. This is a particularly acute problem in a case when the

entire action is settled at the start, including the order of reference. The special master faces a particularly difficult situation when the remedial order and the appointment of the special master are the part of the compromise that has taken place before any testimony has been presented to the judge. Irrespective of the politics of the judge, which I sincerely believe to be irrelevant, I know no judges who hunger after the complex, frustrating, and often intractable problems of managing an institution like a prison. Judges are bound to have personal and professional concerns about the legitimacy of presiding over the implementation of the consent decree which, even if carefully drafted and narrowly focused, is bound to have about it at least an aura of intrusiveness in an area where, in all likelihood, the judge feels like a stranger in a very strange land. The special master, especially after learning the facts of conditions at the institution in question, may have settled in his own mind the difficult threshold issues with respect to the legitimacy of federal jurisdiction and the propriety of the remedial order. His understanding of these issues *must* be translated at an operative level to an understanding of the reasons why his name has been attached to this equitable decree.

The problem I am speaking of can be broken into three components, related to the judge's unfamiliarity with the case: (1) the facts; (2) the order; and (3) the nature and scope of the mastership. In each of these separate, though related respects, the special master bears a heavy burden—one I believe fundamental to the legitimacy of his role—to clear the glass through which the judge is looking and to permit him to see the institution, his order, and the mastership face to face.

Let me consider these three problems in reverse order. First, for a special master to instruct a judge about the nature of the mastership is both presumptuous and ineffective. It is more likely that over time, in the course of daily functioning, the special master will acquaint the judge as to how this new enterprise works, and how it affects his role. A judge may have complex reactions to what he perceives to be the arrogation of his functions by a special master. I do not wish to dwell on those points. Let me say that I believe a special master will be most effective if he can keep clearly in mind the difference between an Article III federal judgeship and a special master, as those differences create specific limitations on the master's authority to reach legal conclusions, direct compliance, and enforce orders through coercive measures.

Second, the judge will come to learn about the nature of his order and its propriety, through a variety of sources, including perhaps hostile letters from political constituencies offended by the various luxuries mandated by the order, and topical and not always accurate stories in newspapers. The special master cannot control these sources. He can

ensure, however, that the order and its underlying purposes are not distorted in their application to prison life. In his communications with the judge, either orally or through written reports, the special master must strive always to portray the order in its appropriate context, and enter findings of fact that are accurate. Also when required, he must render tentative conclusions of law that are measured and well reasoned.

Finally, acquainting the judge with the facts that legitimize his role imposes particular difficulties. Let me suggest here one approach to this difficulty, which at first blush may seem implausible, but which I have seen work.

If at the outset of litigation, or at any point during the mastership, the parties come to their senses with sufficient clarity to resolve the dispute between them on their own, and therefore enter into a consent decree or stipulation, I believe it is a grave mistake to present that settlement to the judge, without providing him some familiarity with the underlying facts that produced that settlement. Although it is common at the outset of such agreements to include boilerplate language disclaiming liability and related perfunctory whereases, it also is possible for the parties to agree on certain facts, and to present an agreed settlement of facts to the judge.

VI. CONCLUSION

It is possible to go on and on, I suppose, about aspects of compliance work that are difficult, or about the various places that a discerning special master can find an "obstacle" to compliance. It is a variation, I guess, on a Custer complex, at least if you are naive enough at the start to believe there cannot be many Indians hidden in the valley. Achieving compliance with the constitutional mandates as they relate to institutional life *is* a complex and frequently baffling task. However, I believe that this task promotes several ideas worthy of pursuit provided they are discharged faithfully and conscientiously. First, and foremost, it creates a prison which is safe, lawful, industrious, and hopeful, which is what we all want prisons to be.[35] Second, the special mastership can facilitate the resolution of disputes outside of court. Plaintiffs and defendants—named parties and their counsel—know more about the prison and the case, care more about its resolution, and are more directly liable to living with the consequences of what they create than any federal judge, no matter how wise or conscientious. Those facts alone argue well for a special master, if that mastership is well designed and faithfully discharged. If we assume for a moment, as I believe we must,

35. J. CONRAD, *supra* note 30.

that the appointment of a special master is something within the legitimate prerogatives of a federal judge, then I believe in the process. This process increases the likelihood that constitutional requirements will be met with the least chance of leaving everyone involved—politicians, administrators, and prisoners—feeling defeated.